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Issue Date: 22 April 2004

In the Matter of

Joseph Anarino,

Claimant

v.

Universal Maritime Service, and The Shaffer Company, Lt.,

Self-Insured Employer.

Case No.: 2003-LHC-01273

DECISION AND ORDER GRANTING BENEFITS[1]

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (hereinafter "the Act"). A hearing was held before me in Baltimore, Maryland, on August 5, 2003, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Joint Exhibits 1 through 2 on behalf of the Claimant and Employer, and ALJ Exhibits 1 through 4 were admitted into evidence.[2] In an Order Establishing Briefing Schedule dated January 14, 2004, I gave the parties 30 (thirty) days to submit post-hearing briefs addressing the issues raised by the Claimant's claim. The Employer's post-hearing brief was filed on February 13, 2004; the Claimant did not file a post-hearing brief. I have reviewed and considered the Employer's brief in making my determination in this matter.

I. Statement of the Case

Testimony of the Claimant

On October 17, 1999, the date of the subject accident or injury, the Claimant was working as a longshoreman for Universal Maritime Service (hereinafter "Employer") in Baltimore, Maryland. At the time of the hearing, the Claimant was 55 years of age, and had been

[1] Citations to the record of this proceeding will be abbreviated as follows: "Tr." refers to the Hearing Transcript; "JX" refers to the Joint Exhibits; and "EX" refers to Employer's Exhibit.

[2] The Joint Exhibits are actually marked in the record as "Employer's Exhibits" ("EX"). At the hearing, Claimant's counsel asked that Employer's exhibits be admitted as Joint Exhibits on behalf of both parties. Additionally, I admitted into evidence one exhibit introduced solely on behalf of the Employer. It has been marked as "EX 2—66."

working as a longshoreman for 32 years. In October 1999, the Claimant served as an assistant chief clerk, responsible for overseeing the input and administration of the Employer's account information. At the time of the alleged injury, the Claimant was in an annex trailer adjacent to the Employer's main building. Although it was not an express duty required of his position, the Claimant was in the middle of changing a water jug on a water cooler, and as he lifted the 5-gallon jug, he felt a burn and dropped the jug, spilling its contents over the floor. The Claimant cleaned up the spill. According to the Claimant, his co-worker, Charles Crowley, was in the annex trailer when the Claimant was changing the water jug, and witnessed the spill. When the Claimant dropped the jug, Mr. Crowley just laughed, and went back to answering the phone. The Claimant continued to work for the remainder of the day.

At the hearing, the Claimant testified that the initial burn lasted for almost two hours, and he then realized that he was having problems with his groin. Although he could not recall the precise time he did so, the Claimant approached his supervisor Jim Bull and told him what had happened. During his conversation with Mr. Bull, the Claimant explained that he was "really not hurt."

Later that week on October 22, 1999, the Claimant met with his family physician, Dr. Ramirez, for a previously scheduled examination regarding a bowel problem. At no time before October 17, 1999 did Dr. Ramirez treat the Claimant for a problem with his groin area. The Claimant explained to Dr. Ramirez what had happened while he was at work on October 17, 1999. According to the Claimant's testimony, Dr. Ramirez diagnosed him with a hernia.

On or about the following work day, the Claimant had a second discussion about what had happened with Mr. Bull. Claimant testified that he told Mr. Bull that he definitely had a hernia, but that he would not be missing any work because of it. Claimant admits that he did not fill out any type of report; nor did Mr. Bull.

Over the next two years, the Claimant visited Dr. Ramirez for regular check-ups. During one visit on May 22, 2001, the Claimant underwent a CT scan of his chest and abdomen, which showed that he was suffering from a hernia.

The Claimant continued to work. However, his condition progressively worsened; his abdomen began bulging to a greater extent, forcing him to lie down until the symptoms subsided. In September 2001, Dr. Ramirez referred the Claimant to Dr. Garrett, who suggested the Claimant undergo surgery to repair his hernia. On September 18, 2001, the Claimant notified his supervisor, Chuck Colgan, of his hernia, the trouble it was giving him, and his scheduled operation.[3] Mr. Colgan subsequently prepared an accident report. On October 29, 2001, Dr. Garrett performed the surgery to repair the Claimant's hernia. Because of the surgery and recuperation process, the Claimant missed work through December 2, 2001, at which time Dr. Ramirez discharged him from his care for the hernia. Claimant returned to work on December 3, 2001. According to the Claimant, the hernia was the only thing keeping him out of work during that period. Before or subsequent to October 17, 1999, the Claimant never sustained an injury to his abdomen or groin area.

[3] At that time, Mr. Bull was no longer working for the Employer.

Testimony of Charles Crowley[4]

Charles Crowley worked as a clerk alongside the Claimant for the Employer at the time of the alleged injury in October 1999. He worked and spoke with Claimant on a daily basis. Mr. Crowley testified that while he worked in the annex trailer, he was two cubicles away from the Claimant and could see the water cooler from his cubicle. Mr. Crowley testified that he did not recall witnessing the Claimant drop the water jug in the annex trailer on October 17, 1999. Nor did he recall speaking with the Claimant about dropping and breaking the water jug, or the Claimant informing him that he suffered a hernia. At the hearing, Mr. Crowley acknowledged that the Claimant may have mentioned something about an occurrence in the annex trailer, but he testified that he could not remember precisely when or what was discussed four years ago.

Testimony of Chuck Colgan[5]

Mr. Colgan was employed by the Employer in 2001 as facility and safety manager. On September 18, 2001, the Claimant notified Mr. Colgan that he was undergoing hernia surgery, which was the first time Mr. Colgan learned about the Claimant's hernia. Mr. Colgan subsequently prepared an injury report. Mr. Colgan further testified that he searched for any paperwork regarding the alleged injury of October 17, 1999 and found none. According to Mr. Colgan, he had no other knowledge of the alleged incident.

James Bull[6]

At the time of the alleged injury of October 17, 1999, James Bull worked for the Employer as the senior operations manager, responsible for managing the daily activities of the terminal, including supervising the employees. As operations manager, Mr. Bull regularly came into contact with the Claimant. When asked about the alleged events of October 17, 1999, Mr. Bull testified that at some point, the Claimant told him about an injury he had sustained lifting a water bottle. Mr. Bull did not prepare any type of accident report.

Mr. Bull was asked to explain the Employer's policy regarding accidents or incidents that result in an injury to an employee. He made it clear that while he was employed with the Employer, any injury or accident was to be reported immediately. Management was then obligated to fill out the appropriate forms, and summon medical attention. The injured employee was also required to submit to a drug and alcohol test. The manager was responsible for thoroughly investigating the incident. Nevertheless, Mr. Bull did not investigate or complete a report when the Claimant told him about hurting himself lifting the water cooler. According to Mr. Bull, he did not complete an accident report because the Claimant told him he was not hurt and indicated that he did not wish to seek medical attention. Mr. Bull added that had the Claimant told him he hurt himself and needed to see a doctor, he would have "absolutely" filled out a report.

[4] Mr. Crowley was called to testify as a witness at the hearing by and on behalf of the Employer.
[5] Mr. Colgan was called to testify as a witness at the hearing by and on behalf of the Employer.
[6] Mr. Bull did not testify as a witness at the hearing. His deposition testimony (June 12, 2003) was introduced by and on behalf of the Employer.

Mr. Bull further acknowledged that the clerks were working in an annex trailer next to the main building for some time. However, Mr. Bull was not familiar with when exactly the Claimant worked in the trailer, or whether there was a water cooler in the trailer.

Mr. Bull's employment ended with the Employer in February 2001. Mr. Bull testified that while he was working for the Employer, he knew of no circumstance under which the Claimant missed work, was in the hospital, or was operated upon for any reason between October 1999 and February 2001.

Peter P. Ramirez, M.D.[7]

Dr. Peter Ramirez is the Claimant's family physician. The Claimant continued to see Dr. Ramirez for the years following the date of the injury. On October 22, 1999, just five days after the alleged accident, Dr. Ramirez had an opportunity to examine the Claimant, during an appointment that was originally scheduled prior to the date of the accident for reasons unrelated to the alleged injury. The parties' joint exhibits contain a hand-written report by Dr. Ramirez dated October 22, 1999 (EX 2-55). Although much of the hand writing is illegible, it is clear that Dr. Ramirez made a note of the Claimant's "inguinal hernia" on his left side.

On May 22, 2001, Dr. Ramirez performed a CT scan on the Claimant's chest and abdomen (EX 2-30). The accompanying report indicates a "very small bilateral fat-containing inguinal hernia." Subsequently, Dr. Ramirez referred the Claimant to Dr. Garrett.

Douglas D. Dykman, M.D.

Dr. Douglas Dykman also treated the Claimant for intestinal concerns dating back to before the alleged accident of October 17, 1999. During an examination on September 14, 2001, Dr. Dykman reported that the Claimant had a "moderate sized left inguinal hernia" (EX 2-27). Dr. Dykman advised the Claimant to have his hernia fixed and suggested a number of possible surgeons, including Dr. Garrett.

In a letter addressed to The Schaffer Company Limited dated June 24, 2002, Dr. Dykman informed the insurer that he diagnosed the Claimant with inguinal hernias. Dr. Dykman further stated that he had "no opinion as to what caused the hernias" (EX 2-7).

Meredith G. Garrett, M.D.

After Dr. Ramirez reviewed the Claimant's CT scan results, he referred the Claimant to Dr. Meredith Garrett (EX 2-20). Dr. Garrett diagnosed a left inguinal hernia on September 26, 2001, and scheduled the Claimant for surgery to repair the hernia (EX 2-10). On October 29, 2001, Dr. Garret performed a "left inguinal hernia repair with mesh" (EX 2-15). In a post-

[7] No physician of record testified as a witness at the hearing. Any evidence supplied by the physicians of record appears summarized in this Decision and Order via their medical reports, which were submitted to this court as an exhibit by the Employer in accordance with the Pre-Hearing Order. The exhibits were admitted as Joint Exhibits on behalf of both parties.

operation report, the Claimant was instructed to rest for 24 hours and return to work after one week (Ex 2-12).

On November 6, 2001, Dr. Garrett completed a disability certificate addressing the Claimant's progress and ability to return to work (EX 2-9). Dr. Garrett acknowledged that the Claimant was under her professional care during the period beginning October 29, 2001 and ending December 3, 2001. She concluded that the Claimant was capable of returning to regular work duties on December 3, 2001.

Laurence Desi, M.D.

On September 20, 2001, the Claimant officially requested authorization from the Employer for an examination (EX 2-24). Subsequently, the Claimant visited Dr. Laurence Desi at the Concentra Medical Centers in Baltimore, Maryland (EX 2-21, 22, 23). Dr. Desi diagnosed the Claimant with a left inguinal hernia on September 20, 2001.

II. Stipulations

The parties have stipulated, and based on the record I find the following:

I. 33 U.S.C. §901 et seq. (the Act) is applicable to this claim.

II. The Claimant and Employer were in an employer/employee relationship on the date of the alleged accident or injury.

III. The Employer has paid no compensation benefits or medical expenses to the Claimant.

IV. The Claimant reached maximum medical improvement on December 2, 2001.

V. The Claimant returned to his usual employment on December 3, 2001.

VI. The Claimant's average weekly wage is $1,154.00.

III. Issues[8]

The issues before me are the following:

I. Whether the Claimant timely notified Employer of the accident or injury.

II. Whether the Claimant's claim for benefits under the Act was timely filed.

[8] In its post-hearing brief, the Employer contends that the Claimant is not entitled to medical treatment expenses for failure to properly request authorization for such treatment. However, no such issue was raised in this claim: there is no indication in the record that the Claimant has requested any specific medical expenses; and Claimant presented no evidence of such expenses.

III. Whether there was an accident or injury on October 17, 1999 that arose out of and in the course of Claimant's employment with Employer.

IV. Whether the Claimant is entitled to temporary total disability compensation benefits under the Act.

IV. Discussion

Timely Notice

Employer asserts that the Claimant's claim for compensation under the Act is barred under Section 12(a) for failure to provide Employer with timely notice of the claim. Specifically, Employer maintains that while Claimant allegedly suffered an injury on October 17, 1999, he failed to inform the Employer that he sustained a *work-related* injury until September 18, 2001—almost two years after the alleged injury.

Under Section 12(a), 33 U.S.C. §912(a), an employee in a traumatic injury case is required to notify the employer of his work-related injury within 30 days after the date of injury or the time when the employee was aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and the employment. Section 12(b), 33 U.S.C. §912(b), requires such notice to be in writing. In the absence of substantial evidence to the contrary, it is presumed pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that the employer has been given sufficient notice under Section 12. *Lucas v. Louisiana Insurance Guaranty Assoc.*, 28 BRBS 1, 4 (1994); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989) (holding that the Section 20(b) presumption applies to Section 12); *see also Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233, 238 n. 3 (1990) (in a footnote, the Board noted that to the extent prior Board decisions hold Section 20(b) inapplicable to Section 12, they have been overruled by *Shaller*.).

Here, it is clear that the Claimant was aware of the work-related nature of his injury at the time it occurred. However, he maintains that he was not aware that his condition would interfere with his capacity to earn wages until much later.[9] The trier of fact must determine the date on which a claimant became aware of the relationship between the injury and the employment. *See generally Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). The Board has held that the "awareness" provisions of Sections 12 and 13 of the Act are identical. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). In a case involving Section 13 of the Act, the Fourth Circuit held that the Act's one-year statute of limitations for traumatic injury does not commence to run until the claimant knows or has reason to know of the likely impairment of his earning capacity. *Newport News Shipbuilding Dry Dock Co. v. Parker*, 935 F.2d 20 (4th Cir. 1991) *relying upon Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). In other

[9] A claimant can be aware of the work-related nature of his injury—that is, he suffered some harm while at work—without being "aware" for purposes of Section 12 and 13 of the Act. The determination of "awareness" under Sections 12 and 13 is not based upon whether the claimant simply knew he suffered some harm while at work, but whether he knew that harm could negatively impact his ability to earn wages—i.e. whether he had a loss to claim. *See Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991).

words, a claimant is not aware of the relationship between the injury and the employment for purposes of Sections 12 and 13 until the employee reasonably believes he has suffered a work-related harm which would probably diminish his capacity to earn his living. *Stancil*, 436 F.2d at 274. In upholding the Board's decision to follow *Stancil*, the *Parker* Court reaffirmed that an experience of pain after the accident was insufficient by itself to establish an awareness of a likely impairment of earning power. *Parker*, 935 F.2d at 27. While the Claimant, as in *Parker* and *Stancil*, may have experienced an accident on October 17, 1999, there was as yet no "injury" for claim or filing purposes under the Act at that time. *See Parker*, 935 F.2d at 25 *citing Stancil*, 436 F.2d at 277.[10]

Although the Claimant experienced the harm on October 17, 1999 and Dr. Ramirez made the first notation in the record acknowledging the Claimant's hernia on October 22, 1999, the Claimant was clearly not "aware" of his potential loss of wage-earning capacity until September 2001. In making the "awareness" determination, the date of a medical diagnosis, although significant, is not always controlling. *See Gregory*, 25 BRBS 188. In the instant case, Dr. Ramirez's initial diagnosis is not convincing of the fact that Claimant was aware of his potential loss of wage-earning capacity; particularly when the Claimant continued to work full-time. Even the Claimant dismissed the immediate pain as simply a burning sensation, and told Mr. Bull that he was not going to miss work. Eventually, after Claimant's pain and discomfort progressed, Drs. Ramirez and Dykman felt the Claimant's hernia had reached a point for which surgery and a referral to another physician was necessary.[11] It was not until September 18, 2001 that the Claimant first met with Dr. Garrett (EX 2-25). On that same day, the Claimant reported his hernia and need for surgery to Mr. Colgan. Dr. Ramirez's suspicions were confirmed by Dr. Garrett's decision to operate on the Claimant's hernia. Although the record does not contain a report from Dr. Garrett dated September 18, 2001 explicitly confirming that she discussed surgery with the Claimant, it is reasonable to infer that the Claimant knew he required surgery after meeting with Dr. Garrett since he informed his supervisor of the hernia and the future operation that same day. Applying the Fourth Circuit's construction of the terms "injury" and "awareness" in Sections 12 and 13 of the Act, I find that the Claimant was first aware of the likely impairment of his earning capacity after meeting with Dr. Garrett on September 18, 2001.

Therefore, Claimant had thirty (30) days from the time of his "awareness"—September 18, 2001—in which to timely notify Employer of his claim for disability compensation. The record clearly demonstrates that in addition to visiting Dr. Garrett on September 18, 2001, the Claimant told his supervisor, Mr. Colgan that he was having surgery for the hernia he had sustained. That conversation was documented in an accident report prepared by Mr. Colgan on September 18, 2001 (EX 1-5). In short, the Claimant became aware of his injury for purposes of Sections 12 and 13 and provided notice to the Employer on the same day. Inasmuch as Employer has provided little, much less substantial evidence sufficient to overcome the Section 20(b) presumption, I find that the Claimant satisfied the notice requirements of Section 12(a).

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[10] The *Stancil* Court construed the meaning of "injury" as it is used in Sections 12 and 13 liberally to "encompass physical harm of a kind which is unknown to the employee at the time of the accident but which is later revealed." *Stancil*, 436 F.2d at 277.

[11] Dr. Ramirez and Dr. Dykman both suggested to the Claimant that he meet with a surgeon to discuss the possibility of undergoing surgery to repair his hernia.

Limitations

The Employer further contends that because the Claimant was injured on October 17, 1999 and medical documentation of Claimant's hernia existed as early as October 22, 1999, the Claimant's October 18, 2001 LS-203 filing was well beyond the statute of limitations period provided in Section 13 of the Act. For the following reasons, however, I find that the Claimant's claim is not time barred under Section 13 of the Act.

Section 13(a), 33 U.S.C. §913(a), provides that, except as otherwise provided in the section, the right to compensation for disability or death shall be barred unless the claim is filed within one year from the time the claimant or the beneficiary becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U. S. C. § 920(b); *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board*, 729 F.2d 1441 (2d Cir. 1983). As mentioned above, the "awareness" provisions of Sections 12 and 13 of the Act are identical. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). Therefore, inasmuch as I have found the Claimant to have been aware of the relationship between his injury and employment as of September 18, 2001, *see discussion supra*, the Claimant had one year from September 18, 2001 in which to file his claim for benefits under the Act. On October 18, 2001, the Claimant completed an LS-203, "Employee's Claim for Compensation" form (EX 1-2), which was received on October 31, 2001 (EX 1-3). Accordingly, the Claimant's claim for benefits under the Act was timely filed.

Causation

The Employer argues that the Claimant's physical impairments and need for surgery were not the result of an accidental injury arising out of and in the course of his employment on October 17, 1999. Employer denies that the Section 20(a) presumption has been properly invoked, but if this Court finds that it has, Employer maintains that there is substantial evidence to sever the connection between the injury and the employment. For the following reasons, I find that the Section 20(a) presumption applies, and I disagree with the Employer's assertion that it has severed the connection by substantial evidence.

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences from the evidence. *Wendler v. American National Red Cross*, 23 BRBS 408, 412 (1990). It is also well-established that the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989) *citing Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

The Act provides a presumption that a claim comes within its provisions. *See* 33 U.S.C. §920(a). However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a *prima facie* case. According to the United States Supreme Court, a *prima facie* claim for compensation must at least allege an injury that arose in the course of

employment as well as out of employment. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). A claimant's credible subjective complaints of pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). Once this *prima facie* case is established, the presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Kier*, 16 BRBS 128.

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. § 902(2); *U.S. Industries*, 455 U.S. at 615. The Board and Courts have described the meaning of "injury" in fairly broad terms. The Board has held that "if something unexpectedly goes wrong within the human frame, even if this occurs in the course of usual and ordinary work, claimant has sustained an accidental injury under the Act." *McGuigan v. Washington Metropolitan Area Transit Authority*, 10 BRBS 261, 263 (1979); *see also Wheatley v. Adler*, 407 F.2d 307, 311 n. 6 (D.C. Cir. 1968). In other words, the Act does not require a showing of unusual stress or exposure to anything more than the ordinary hazards of living and working. *Wheatley*, 407 F.2d at 311.

Based on the following, I find that the Claimant has established that he sustained physical harm or pain while working for Employer on October 17, 1999, as the result of an "accident or injury" that could have caused that harm or pain. The Claimant testified that while lifting a 5-gallon jug of water he experienced a burning sensation in his groin area and immediately dropped the water jug. Just five days after the accident and initial burning sensation, Dr. Ramirez documented a left inguinal hernia. The Claimant testified that his pain and discomfort slowly progressed over the following years. Indeed, the record contains a number of medical reports that acknowledge the Claimant's hernia, and document the Claimant's statements that he first experienced discomfort while lifting the water jug. Having had the opportunity to observe the Claimant at the hearing, I find his testimony credible and consistent with the medical evidence of record. The record also contains testimony by the Claimant's co-workers suggesting that most everyone there has changed the water jug on the cooler at some time. Mr. Crowley testified that he did not remember the accident happening, but did state that the Claimant may have mentioned it at some point. Nevertheless, there is ample evidence of record to find that conditions existed at Claimant's work which could have caused the harm. I, therefore, find that

the Claimant experienced some physical harm or change in his frame while working on October 17, 1999 sufficient to establish a *prima facie* case under the Act. Accordingly, Claimant is entitled to the statutory presumption under Section 20(a). The burden now shifts to Employer to establish that the Claimant's condition was not caused or aggravated by his employment.

To rebut the presumption, the party opposing entitlement must present "substantial evidence" proving the absence of or severing the connection between such harm and employment or working conditions. *Kier*, 16 BRBS at 129; *Parsons Corp. of California*, 619 P.2d at 41; *Butler*, 363 F.2d at 683; *Ranks*, 22 BRBS at 305; *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *Noble Drilling v. Drake*, 795 F.2d 478 (5th Cir. 1986); *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996). If the employer presents "specific and comprehensive" evidence sufficient to sever the connection between a claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. *See, e.g.*, *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 102 (1986); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700 (2d Cir. 1981).

In its attempt to rebut the Section 20(a) presumption, the Employer points to and relies upon a number of the Claimant's unrelated doctor visits during which the treating physicians did not mention the Claimant's hernia, or were unable to affirmatively connect the Claimant's hernia to his employment. For example, Employer cites to Dr. Dykman's treatment of the Claimant's unrelated bowel problems of 1999, including a colonoscopy procedure in 2001. It further cites to the Claimant's heart and lung examinations by different physicians in 1999 and 2000. And finally, Employer cites to the Claimant's treatment records for a right knee injury in early 2001. Presumably, the Employer has cited to these other medical reports in hopes that this Court will infer then that the Claimant did not suffer from a hernia injury arising out of his employment; as the argument seemingly goes, if Claimant did suffer from the hernia on October 17, 1999, those other physicians would have documented it. To the extent that this is the Employer's argument, I disagree.

The only thing I can infer from the medical reports cited to by the Employer is that those physicians were not treating the Claimant for a hernia. The fact that the Claimant went to see a physician for a knee injury and that physician did not make note of a hernia certainly does not suggest that his hernia was unrelated to his employment, much less constitute substantial evidence necessary to rebut the Section 20(a) presumption. Likewise, the fact that Dr. Dykman was treating the Claimant for an unrelated bowel condition in December 1999 and failed to note a hernia in the accompanying report is not substantial evidence to rebut the presumption, particularly when Dr. Ramirez clearly documented the hernia one month earlier on October 22, 1999 (EX 2-55). Nor is the connection severed because Dr. Dykman was unable to provide an opinion in 2002 as to what caused the hernia.

Under the Act, the presumption may be rebutted by negative evidence if it is specific and comprehensive enough to sever the potential connection between the particular injury and the job-related accident. *Swinton v. J. Frank Kelly. Inc.*, 554 F.2d 1075, 1083 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Dr. Dykman's inability to pinpoint the exact cause of the hernia is not specific or comprehensive. Employer must produce facts, not speculation, to overcome the

presumption of compensability. There is simply no medical evidence in the record establishing that Claimant's hernia was caused by something other than lifting the water jug.[12] The Employer's reliance on mere hypothetical probabilities in rejecting the present claim is contrary to the presumption created by Section 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). In short, Employer has not severed the causal connection between the Claimant's condition and his employment, and Claimant's claim against Employer comes within the provisions of the Act; specifically, his injury arose out of and in the course of his employment. *See generally Wheatley*, 407 F.2d 307. Consequently, Employer is fully liable for disability compensation and all medical benefits to which the Claimant is entitled under the Act resulting out of the October 17, 1999 injury.

Nature and Extent of Disability

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. The extent of a disability, on the other hand, cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Disability is defined under the Act as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. Of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage earning capacity.

Typically, the burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 59 (1985). However, the nature and extent of the Claimant's disability is not in dispute in the case at bar. The Claimant has brought this claim seeking only temporary total disability compensation during the period beginning October 29, 2001—the date of the surgery—through December 2, 2001. In its post-hearing brief, Employer admits that the Claimant's entitlement to temporary total disability compensation "rises or falls with the determination on accidental injury in this case" (Employer's Post-Hearing Br. at 7). In other words, Employer has not disputed that Claimant was totally disabled during that period. The parties stipulated that the Claimant reached maximum medical improvement on December 2, 2001. Moreover, the parties have stipulated that the Claimant returned to his usual employment on December 3, 2001—i.e. Claimant does

[12] During closing arguments at the hearing, the parties made reference to a statement presented by Mr. Bull during his June 12, 2003 deposition regarding a possible cause of Claimant's hernia (EX 1 at 1-18). The deposition transcript reveals that Claimant's counsel objected to the statement on grounds it was hearsay and the deposition properly continued. While Employer's counsel did not proffer the statement at the hearing, the deposition transcript was admitted into evidence. Hearsay evidence may be admitted into the record during a hearing in front of the Office of Administrative Law Judges if it is *reliable*. Although I admitted Mr. Bull's deposition into the record without an explicit ruling on the alleged hearsay statement, I now find that statement to be wholly unreliable: not only did no witness corroborate the statement, but the Claimant did not have an opportunity to cross-examine Mr. Bull or the declarants at the hearing. Therefore, I have not considered this evidence in my determination in this matter.

not claim any permanent loss of wage-earning capacity beyond that period. In short, I have found that the Claimant's injury arose out of and in the course of his employment; and the Employer agrees that Claimant is entitled to temporary total disability. Thus, based on the parties' own stipulations and the evidence of record, I find that the Claimant was temporarily and totally disabled from October 29, 2001 through December 2, 2001, during which Claimant was undergoing, and recuperating from surgery.

ORDER

On the basis of the foregoing, the Claimant's request for temporary total disability compensation is GRANTED.

Employer shall:

A. Pay the Claimant temporary total disability compensation benefits from October 29, 2001 through December 2, 2001, based on an average weekly wage of $1,154.00

B. Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his injuries of October 17, 1999.

C. Pay to the Claimant all medical benefits to which he is entitled under the Longshore and Harbor Workers' Compensation Act.

D. Pay to the Claimant's attorney fees and costs to be established by a supplemental order.

E. The District Director shall perform all calculations necessary to effect this Order.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge